COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Linda M. Berardi
S. S. No. xxx-xx-2818

City of Norfolk
Norfolk, Virginia

Date of Appeal
to Commission: November 24, 2010

Date of Hearing: April 12, 2011

Place: RICHMOND, VIRGINIA

Decision No.: 95832-C

Date of Mailing: June 9, 2011

Final Date to File Appeal with
Circuit Court: July 9, 2011

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This case comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-1029223), mailed November 22, 2010.

APPEARANCES

Claimant, Attorney for Claimant
and Attorney for Employer

ISSUES

Should the claimant's request that the Commission direct the taking of additional evidence and testimony be granted as provided in Regulation 16 VAC 5-80-30(B)?

Did the claimant leave work voluntarily without good cause as provided in Section 60.2-618(1) of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal of the Appeals Examiner's decision, which affirmed the initial Deputy's determination, and held the claimant disqualified for unemployment compensation benefits, effective September 5, 2010. The Appeals Examiner concluded that the claimant had been discharged for misconduct connected with work.

The claimant participated in the Appeals Examiner's hearing; however, by letter dated December 22, 2010, the claimant submitted information to Commission Appeals, which is not in the record developed by the Appeals Examiner. Therefore, the Commission accepted the claimant's appeals correspondence as her request to present additional evidence.

Prior to filing her claim for benefits, the claimant last worked for the City of Norfolk, Virginia, and specifically for the City of Norfolk Community Services Board ("CSB"), from December 2, 1991 through September 3, 2010, or for 19+ years. By the end of her employment, she worked fulltime as a human resources ("HR") officer or manager, earning approximately $92,000.00 per year. The claimant usually worked from 8:30 a.m. to 5:00 p.m. Occasionally she may have had to come in early or stay late, so she usually worked 40 to 45 hours per week.

In the fall of 2002, the claimant was assigned to oversee the operations of CSB's HR department or function, located within the administration division. The claimant was a direct report to "B.W.", CSB's director of administration, who oversaw, e.g., CSB's financial management and HR functions. This division director reported directly to CSB's executive director, who was responsible for oversight of all CSB divisions, departments and personnel.

In spring 2003, the claimant became aware that an employee, "J.M.", who no longer appeared to be an active CSB employee, was still on the employer's payroll after being placed on disciplinary suspension in 1998. The claimant looked in the employee's CSB personnel file and learned that she was an office assistant who had been suspended for carrying a weapon onto board property. The claimant duly reported the issue to the director of administration, her direct supervisor, and asked her what she should do. Her director told her not to do anything, that she would handle it.

On June 13, 2003, the claimant sent an email inquiry to the director of administration about J.M. and another individual, asking if they were going to take them "off the payroll … for the next fiscal year?" (Ex. 11, p. 5). This email was prompted by an

inquiry to the claimant from another staff member, concerning board payment for health insurance for the other individual. The exchange of emails for this timeline does not include any email response to the claimant from the director of administration about J.M. The claimant did nothing further relative to it.

On October 19, 2006, one of the employer's financial managers sent the director of administration and the claimant an email with a list of affected staff members for the employer's excess annual leave purge. J.M. was on the list, as was the director of administration. The director of administrative sent an email response to the financial manager, requesting detail on how much annual leave had been purged for the persons on the list. (Ex. 11, p. 3). No other instructions relative to J.M. were included by the director.

On June 21, 2007, there was an email exchange between several individuals, including CSB's financial officer, "S.W.," concerning a test run for implementing the two percent (2%) "GWI," i.e., some type of gross wage increase, for certain categories of CSB employees, as part of the employer's time frame for implementing that wage change. At that time, the financial officer noted that some "terminated" employees remained on the list of employees slated to get the 2% GWI. One of the financial officer's emails in this exchange contains language to the effect that several individuals should be excluded from the list of employees to receive GWI, including J.M. The claimant and her director or administration both received copies of this email listing J.M. as an employee excluded from the wage increase. (Ex. 11, p. 2). No other instructions relative to J.M. were included in this email exchange.

On February 17, 2009, the claimant sent her director of administration another email, indicating that a staff member from the City's HR department had called to tell her that J.M. was still getting paid and not terminated. The claimant professed to the director that she did not know what J.M.'s status was, but the City's HR department thought it prudent to "to let me know." A week later, on February 24, 2009, the claimant sent her director a second email, to the effect that she and another CSB employee had looked through J.M.'s personnel file. She disclosed to her director that the only thing they had found was a 30-day suspension letter with no outcome to support a discharge letter to J.M. The claimant expressly asked her director in that email:

> Do you know where we could find information and/or can you assist with wording of the letter to her to justify the action to remove her from payroll? (Exhibit ("Ex.") 11, p. 1).

The actual letter the claimant references from J.M.'s file is a 1998 letter from the director of administration, "B.W.," to this individual. (Ex. 12). This letter indicated that J.M. had been suspended without pay, beginning April 14, 1998, based on "unauthorized carrying of a weapon on Board property." This letter also informed J.M. that her suspension would remain in effect until an investigation has been completed, with the Board having 30 days to conduct an investigation. Copies of this letter were also sent to "A.C.," the director of clinic services, and at least one other individual on April 14, 1998. There is no copy of any response from the director of administration to the claimant's emails in the record.

It was the claimant's understanding from her knowledge of personnel policy or procedure that an employee could only remain on suspension without pay status for 30 days. At the end of 30 days, if no other action were taken, the employee's pay had to be triggered back on.

The claimant stated to the Deputy that whenever she brought the matter of J.M. to the director of administration's attention, the director told her she would handle it. While the director of administration had the management authority to remove individuals from payroll, for any host of reasons, including suspension, termination, etc., or to at least recommend to the board that such action be taken, the director of administration did not tell the claimant to do anything to start the process of removing J.M. from the employer's payroll. The claimant did not possess the management authority to actually remove anyone from the payroll herself, i.e., to suspend, fire or discharge anyone, or to change the status of the employee on the employer's payroll system, without approval from the director of administration and/or the board.

Additionally, the claimant believed that many other CSB and City employees were aware of the J.M. situation, including her boss, the director of administration; the former executive director; the financial officer; some of the City's HR staff; and individual's copies on various emails. For that reason, she did not have any basis to believe or suspect that there was anything fraudulent or untoward going on. At some point, she also came to believe that the employer's attorney, i.e., the City Attorney's Office, was also aware of the J.M. situation, due to some type of litigation that had previously taken place.

By some point, after the matter of J.M. had been raised repeatedly in different contexts by various staff members from the City or CSB, including the issue of whether anything needed to be done to remove her from payroll, the claimant came to believe that it must be a legal matter, perhaps a legal settlement matter, or

administrative leave with pay matter. Neither the claimant, nor her staff, were ever advised by anyone from the City or CSB to take any action to actually start the process of removing J.M. from the employer's payroll.

At least by October 2009, a new executive director for CSB came on board. The claimant believed the issue of J.M. had been raised in a management meeting that the new executive director had attended in October 2009, but the new executive director denies having become aware of it until April 2010. The claimant also believed the former executive director or the director of administration would have told the new executive director (or the board) about the J.M. matter if it were necessary. She did not believe she had any obligation to do so.

In April 2010, while the employer was going through the process of budget preparations so as to implement a reduction in force ("RIF"), based on seniority, the new executive director came across J.M.'s name as an active employee. She did not recognize her name as being an actual, active CSB employee. By making some inquiries, the executive director discovered that J.M. had remained on the employer's payroll, erroneously, for approximately a dozen years, and had been, erroneously, paid ½ million dollars in pay, after having been placed on administrative leave or suspension without pay for bringing a firearm to work. Apparently, however, J.M.'s suspension without pay status triggered off, after a 30 or 60-day period of time elapsed from her initial suspension, without formal intervention with the payroll system of any type. This occurred before the claimant had come on board as the HR manager. Thereafter, no one had taken any steps to actually remove J.M. as an active employee from the employer's payroll system, so she continued to be paid by the employer for those dozen years.

Upon discovering the J.M. situation, the new executive director met with the City Attorney's Office for legal advice. The executive director suspected that J.M. should have been discharged or terminated from work for this disciplinary offense back in April or May 1998, and her pay by the employer discontinued from that point forward. After that meeting with the employer's attorney(s), the executive director immediately discharged or terminated J.M. from employment and removed her as an active employee on the employer's payroll system, so as to stop her from receiving further pay to which she was not entitled.

In light of this incident involving J.M., the executive director believed her management team had violated her edict, when she first came on board to replace the former executive director, that there be "no surprises." The executive director was deeply concerned and disappointed that none of her management team had come forward to

let her know about J.M.'s remaining on the employer's payroll, in light of her open door policy and regular management team meetings. She was also concerned that no one had reported it to CSB's board of directors at any of its regular, monthly meetings. The executive director also could not understand why no one had reported it to the employer's fraud, waste and abuse hotline or corporate compliance officer. The executive director deemed her management team's collective failure in this regard to constitute a breach of their fiduciary duty or breach of their duty of care or responsibility to the employer to protect its assets and resources. She also deemed it a violation of "The Whistleblower's Act."

For these reasons, the executive director made the decision that she needed to go forward with new leadership, i.e., to terminate the services of her entire management team, i.e., five individuals, including the claimant. While the claimant was not one of the executive director's direct reports, she deemed the claimant to be part of her management team. In effecting this change in leadership for the employer's CSB, the executive director met with the claimant, along with a representative from the City's HR director's office on September 3, 2010. During this meeting the executive director discussed the need for new leadership and offered the claimant the choice to resign or be terminated.

By this point in time, due to the employer's changing its grievance policy, during the course of the employer's investigation into the J.M. matter, the claimant no longer enjoyed access to the employer's grievance procedure or process for adverse personnel decisions. Rather, being categorized as a manager, she was deemed an at will employee, ineligible to use that grievance process and procedure. Under these circumstances, the claimant submitted a letter of resignation to protect her job history and professional or employment reputation. The employer also agreed to give her a neutral reference if she resigned.

During that meeting with the executive director and City HR representative, the claimant shared with them that she had been in her position for many years and had always tried to carry out her duties to the best of her abilities. She told them she had reported the situation with J.M.'s payroll classification several times to her supervisor, who was CSB's director of administration, a higher-ranking manager than she was, and one of the executive director's direct reports. The executive director, however, felt the claimant's actions in this regard were insufficient since she had access to the executive director; the corporate compliance officer; the fraud, waste and abuse hotline; and CSB's board of directors.

By this point in time, the executive director conceded, roughly 90 days had elapsed between the time she had made her determination that the claimant had failed in some obligation and when she actually told her she needed to resign or be fired.

When J.M. was an active employee, she had been an office assistant in the employer's CSB's substance abuse program, in the clinical services division, which receives public funds, for example, federal block grants. The employer pays its CSB employees' payroll for that program, at least partially from public funds, including federal, state and local public funds. Apparently, J.M. had not performed personal services for CSB or been physically present at its worksite since her disciplinary suspension or leave without pay, which began April 14, 1998, yet she continued to be paid, regularly as a CSB or City employee, 30 days or so after that date, until the new executive director discharged her from employment at some point around approximately April 2010.

Under the employer's service provider contract with the Commonwealth of Virginia, the employer was required to report to the State the matter of its having erroneously paid "J.M." for a dozen years. A State auditor was dispatched to investigate the matter, under a theory of misappropriation of public funds, along with the Federal Bureau of Investigation, the Office of the Inspector General and the Virginia State Police and/or the Norfolk Police Department, since both State and Federal grant funds were involved. The matter also became a prominent news item, i.e., "in the headlines," as the executive director characterized it, or a topic of public discussion. The employer conducted its own press conference involving the matter, too, in which the executive director participated.

The executive director felt the overall J.M. matter brought into question the management and integrity of the employer's CSB and had damaged the board's reputation in that way. The executive director explained, too, that the money erroneously paid to J.M. would have to be returned by CSB, as an encumbered expense or a liability. For these reasons, she felt that a new leadership or management team was necessary going forward in her tenure as executive director.

As of the time of the Appeals Examiner's hearing, On November 18, 2010, the law enforcement agencies investigating the J.M. matter had not completed their respective investigations. By that time the executive director had not been advised of any finding of fraud at any level, excluding J.M., by any individual working for the employer during the time J.M. erroneously continued to receive pay from the employer. There is no evidence before the Commission that the claimant, or any others discharged over the J.M. matter, failed to cooperate with the employer, its attorneys, or any other

oversight or law enforcement agency undertaking the overall investigation of the J.M. matter. Prior to her discharge from employment, the claimant had no prior disciplinary record or work performance problems with the employer.

By the time of the Appeals Examiner's hearing, the executive director still did not know why J.M. had stayed on the employer's payroll for 12 years without coming to work. She had been told it did not involve a legal settlement. The claimant's manager, the director of administration, B.W., had told the executive director, "It was just a simple oversight."

The Appeals Examiner's hearing was scheduled for 3:00 p.m. on November 18, 2010. A written notice of the hearing was mailed to the respective, correct address of each party for both hearings on November 1, 2010. The notice of hearing contains clear and unambiguous instructions relative to what the parties must do in order to participate in the hearing including, e.g., that they "must be prepared to present their case at the time scheduled for hearing before the Appeals Examiner, including all documents and witnesses necessary to your case." The respective hearing notices also apprised the parties that:

> IMPORTANT - PLEASE READ
> THIS MAY BE YOUR ONLY OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY WITH RESPECT TO YOUR CLAIM. THEREFORE IT IS IMPORTANT THAT YOU PARTICIPATE IN THE HEARING AND BE PREPARED TO PRESENT YOUR COMPLETE CASE.

The notice of hearing apprised the parties of everything they must do relative to making all necessary arrangements for witnesses or other parties they wished to participate in the hearing, for obtaining counsel of their choice, or for submission to First Level Appeals and exchange with other party of any documents they wished to offer as evidence at that appeals hearing.

Both parties and their respective counsel of record participated in the hearing before the Appeals Examiner.

The Commission did not grant the parties leave to submit further argument after the conclusion of the Commission hearing for oral argument on April 12, 2011. Accordingly, the Commission declines to consider the claimant's post-hearing written argument submitted by fax to Commission Appeals on April 13, 2011.

OPINION

The Commission must first address the claimant's request to present additional evidence on appeal, i.e., a copy of the Norfolk Community Services Board's Policies and Procedures regarding "Behavioral Expectations," issued July 2002 and revised September 2004, consisting of 10 pages.

Commission decisions usually are rendered based upon a review of the record established at the Appeals Examiner's hearing. Section 16 VAC 5-80-30(B) of the Virginia Administrative Code, the Regulations and General Rules Affecting Unemployment Compensation. Section 60.2-622 of the Code of Virginia (1950), as amended, authorizes the Commission to direct the taking of additional testimony and evidence in any case pending before it, or to take such additional testimony and evidence itself.

To ensure the fair and consistent exercise of this statutory authority, the Commission has established specific guidelines governing its acceptance of additional evidence. These authorize the Commission to take additional evidence only if the evidence: (i) is newly discovered or could not have been presented at the prior hearing through the exercise of due diligence; (ii) would tend to support a different result if it were in the record; and (iii) is not merely cumulative, corroborative or collateral. The Commission also may take additional evidence if the record of proceedings before the Appeals Examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law upon review. Section 16 VAC 5-80-30(B), Virginia Administrative Code.

The Commission concludes that the claimant did not submit a timely request to present additional evidence, since it was not made within 14 days of the date of the Clerk of the Commission's mailing of the Notice of Appeal. The claimant did not make her request to present additional evidence until December 22, 2010, or more than 15 days after the agency generated Notice of Appeal was mailed to her by the Clerk of the Commission on December 1, 2010. Under Regulation 16 VAC 5-80-30(B)(2), a party wishing to present additional evidence or oral argument before the Commission must file a written request within 14 days from the date of delivery or mailing of the Notice of Appeal. Consequently, it was not a timely such request.

Nevertheless, even if the Commission were to consider the substance of the claimant's request, the Commission would conclude that it should not be granted. Here, the claimant and her attorney of record participated in the Appeals Examiner's hearing.

Additionally, the instructions contained in the Notice of Telephonic Hearing Before An Appeals Examiner informed the parties that the hearing before the Appeals Examiner may be their only chance to present evidence. It also noted the importance of participation in the hearing and presentation of the party's complete case at that time through submission of documents or appearances of witnesses or other parties.

First of all, the document the claimant now wishes to present was in existence at the time of the Appeals Examiner's hearing. If the claimant did not have access to that document, she could have requested the Clerk of the Commission to subpoena the document for her from the employer, prior to the Appeals Examiner's hearing, through the exercise of due diligence. Additionally, the claimant could have presented a summary of the policy evidence she wished to present, either through her own testimony or that of the employer representative. Secondly, the record is sufficient to enable the Commission to make proper, accurate, and complete findings of fact and conclusions of law.

Accordingly, since the claimant's request was untimely and does not satisfy the regulatory criteria for the receipt of additional evidence contained in 16 VAC 5-80-30(B), the request is denied and the Commission decision will be based on the existing record, as developed by the Appeals Examiner.

The Commission must next address the issue going to the claimant's separation from employment and qualification for benefits.

Section 60.2-618(1) of the Code of Virginia (1950)("Code"), as amended, provides for a disqualification if the Commission finds that a claimant left work voluntarily without good cause.

Section 60.2-618(2) of the Code provides for a disqualification if the Commission finds that a claimant was discharged due to misconduct connected with work.

In any case involving a voluntarily leaving of work, the burden of proof is on the employer to establish by a preponderance of the evidence that the claimant left work voluntarily. Once a voluntary leaving is shown, the burden would then shift to the claimant to establish that she left for reasons that could be considered good cause. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971); Shuler v. V.E.C., 9 Va. App. 147, 384 S.E.2d 122 (1989).

The Commission has consistently held that when an individual is given the option of submitting a resignation in lieu of immediate termination, the separation is involuntary, and the issue becomes whether the separation was for reasons that constitute misconduct connected with work. Howard v. Woodward & Lothrop, Commission Decision 5669-C (May 26, 1972).

In this case, it is undisputed that the employer's executive director gave the claimant the option of resigning in lieu of immediate and impending discharge. Accordingly, the Commission concludes that the claimant was discharged, and therefore, the case was correctly decided under the provisions of Section 60.2-618(2) of the Code. As a result, if the claimant is to be disqualified for benefits, the employer must establish that she was discharged due to misconduct connected with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

> In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

The disqualification for misconduct is a serious matter which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with work. Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986); Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Collins v. City of Norfolk Treasurer's Office, Commission Decision 22536-C (March 8, 1984), aff'd, Circuit Court for City of Norfolk, Chancery No. G-84-428 (August 17, 1984). This burden is not carried by mere allegation. It requires specific detailed information to establish that it is more likely than not that the misconduct actually occurred. Harris v. Tidewater Regional Transit, Commission Decision 24516-C (January 24, 1985).

In the case of Miller v. J. Henry Holland Corp., Commission Decision 7470-C (February 9, 1976), the Commission reiterated its position that:

> ... . [M]ere inefficiency, incapability, mistake or misjudgment has never been tantamount to misconduct.

Here, the employer has failed to come forward with a copy of any published policy, procedure or rule that the claimant is deemed to have deliberately violated, including its corporate compliance program, whose training program was developed in response to the J.M. situation. Accordingly, the Commission is unable to conclude that the employer has proven a prima facie case of misconduct against the claimant under the first prong definition of misconduct enunciated in Branch, i.e., for a deliberate rule violation.

Further, the employer has not demonstrated to the Commission's satisfaction that the claimant engaged in willful misconduct, under the second prong of Branch. The definition of misconduct under the second prong contemplates actions or omissions of such a nature or so recurrent as to manifest a willful disregard of the employer's interests or the duties and obligation the employee owes the employer. Kennedy's Piggly Wiggly Stores, Inc. v. Cooper, 14 Va. 701, 419 S.E.2d 278 (1992). Absent direct proof of willfulness, the [VEC] must consider both the nature and frequency of the acts from which willfulness is inferred. Whitt v. Ervin B. Davis & Co., 20 Va. App. 432, 457 S.E.2d 779 (1995).

Here, the claimant was discharged from employment solely over the J.M. matter. Nothing else in her almost 20 years of employment with the employer played a role in her discharge from employment. The new executive director deemed her entire management team's collective failure to bring the matter of J.M. to her when she first took over as executive director, or to have otherwise previously taken care of that matter, to constitute, e.g., a breach of their fiduciary duty or breach of their duty of care or responsibility to the employer to protect its assets and resources. She also deemed it a violation of "The Whistleblower's Act." The new executive director also considered the J.M. matter to fall under the umbrella of unreported fraud, abuse or waste. For these reasons, the new executive director made the executive decision, in early September 2010, to make a clean sweep of her management team, in which she included the claimant, telling them to resign or be fired, so that she could go forward with new leadership after that point solely due to the J.M. matter.

The employer has not demonstrated in the record of proceedings, however, that the claimant, somehow, breached any fiduciary duty she owed to the employer, that she breached her duty of care or responsibility to the employer to protect its assets and resources, or any other duty she owed the employer, or that she violated any whistleblower or other law, as the executive director has maintained during these claims adjudication proceedings.

Further, there is absolutely no evidence in the record that the claimant engaged in any type of fraud, dishonesty, misrepresentation or deceit relative to the overall J.M. matter, or that she had any type of financial gain from it whatsoever.

Rather, the evidence in the record amply demonstrates that the claimant brought any and all inquiries she received from the City's HR department, or others within CSB's sphere of operations, about J.M.'s status as an active employee to the attention of her immediate supervisor, the director of administration. She first did so in 2003, after she had come to that particular job in 2002, and regularly thereafter, whenever circumstances warranted her doing so. Her supervisor, the director of administration, was someone in the employer's chain of command who directly reported to the executive director, had access to the board of directors, and also possessed the direct authority to investigate, resolve and fix any CSB financial services or HR problem, including any of its payroll or personnel problems. This director was also clearly a part of CSB's executive management team, and the division director that others within CSB, including its financial officer, directed their inquiries about J.M.'s status.

In the Commission's opinion, the director of administration also had a higher duty to resolve the matter than the claimant, due to her involvement in the initial, disciplinary proceedings involving J.M., as evidenced by the only letter in J.M.'s personnel file, which this director had signed placing J.M. on suspension and leave without pay pending board investigation of a serious disciplinary offense, albeit with a 30-day timeline for board action. Additionally, this letter was sent to at least one other division director, i.e., J.M.'s division director, back on April 16, 1998. Very importantly, as early as 2003, when the claimant first raised her concern with J.M.'s classification, the director of administration told the claimant she would handle it.

Nevertheless, the claimant continued to alert her supervisor, the director of administration, of her and others' concerns with the J.M. matter in writing via email on several more occasions from 2006 to 2009. Again, the claimant received no indication she was required to take any action regarding the J.M. matter. She did not

receive any management guidance that she should be doing anything further relative to the J.M. matter, despite asking her director via email for such guidance.

Moreover, by 2006, as the claimant successfully has demonstrated, there were many others in the employer's organization, including staff from the City's HR department and CSB's administration division, including a financial officer, and another division director, who knew that J.M. continued to be classified as an active employee and remained on the employer's payroll along with other CSB employees who appeared to have been "terminated." Some of these other CSB employees also reported their concerns to the director of administration, too, yet none of them took any further action about it. Even when the director of administration took affirmative action to send an email about the annual leave purge list involving herself and J.M., she did so in the context of merely asking for the number of hours of annual leave purged. In the Commission's opinion, this request for further information would not raise suspicion or concern that any other action was indicated.

No doubt, too, J.M.'s former superiors in the clinical services division, where she had worked for CSB, also knew she continued to be on active payroll, as the Commission reasonably infers. After, all, they were responsible for submitting or approving J.M.'s timesheets, which triggered the payroll department to actually pay her throughout the dozen years at issue. Also, it bears reiteration, that division's director had received a copy of the director of administration's suspension without pay letter to J.M. dated April 16, 1998. Consequently, by some point in time, the claimant came to believe that knowledge of J.M.'s situation or employee classification was well known to CSB's executive/management team, including at least two division directors, the former executive director, CSB's financial officer, and likely others, including staff in the City's HR department and, she came to believe, staff in the employer's attorney's office due to some type of litigation between the employer and J.M. at some point in time.

For these reasons, the claimant came to believe it was a legal settlement matter, a leave with pay matter, or such, which did not trigger any further suspicion or alarm with her, or prompt her to believe she had any duty to take further action relative to J.M.'s payroll status. Based upon all attendant circumstances demonstrated in the record, the Commission is unable to conclude that the claimant's beliefs in this regard were unreasonable or entirely subjective. Accordingly, the Commission is unable to find any direct proof of willfulness on the claimant's part in the J.M. matter. Rather, she exercised due diligence to alert her immediate director to the matter of J.M., when she first was made aware of it, and thereafter, made sure that individual was kept in the loop

regarding further inquiries she received regarding the J.M. matter, and relied in good faith upon her director's assurances that she would handle it.

It also appears to the Commission that since the director of administration had authored the only letter remaining in J.M.'s personnel file, to the effect that she was suspended without pay, effective April 16, 1998, pending the board's investigation of that matter, that she and J.M.'s own division director, who was copied on that letter, were well versed with the facts pertaining to J.M.'s disciplinary circumstances. The director of administration's April 16, 1998 letter also alluded to the fact that the board's investigation had to be completed within 30 days. This comports with the evidence in the record that J.M.'s payroll would have been triggered back on, once the initial 30-day suspension without pay period elapsed, unless other action was taken. (emphasis added). There is, however, no evidence in the record that other action was taken by the employer or its board relative to J.M.

Thereafter, the record makes it abundantly clear that the director of administration and others knew of J.M.'s continuing payroll classification as an active employee, including retaining a position identification number, as did several other managers and staff at CSB, including its financial officer, for many, many years while J.M. continued to receive her regular payroll as an active employee from the employer. While the Commission does not agree with the director of administration's self-serving explanation to the new executive director, that "it was just a simple oversight," the Commission is unable to attribute responsibility or blame for the J.M. matter to the claimant, who was, after all, one of the two lower level managers discharged over the matter, and one who bears less culpability for the employer's payroll error.

Rather, the Commission finds the claimant's testimony credible that she believed she had duly reported her concerns; the matter had been acted upon by her superiors or others; that there was a purpose, that she was unaware of, for that employee to remain on employer's payroll; and that she had no personal authority to make a payroll decision or change in payroll status for this individual. In doing so, she has successfully challenged the employer's case against her for misconduct.

Conversely, the employer did not provide sufficient rebuttal evidence to the contrary, or demonstrate that the claimant displayed any dishonesty, improper motive or lack of appropriate diligence in reporting this matter up her chain of command to her division director, i.e., the director of administration, a direct report to the executive director. The claimant also reasonably believed the prior executive director knew of J.M.'s status, so that either the

former director or her director of administration would report the matter to the new director or the board, if necessary. As such, the claimant's failure to alert the new director of the J.M. matter was not out of any type of fraud, deceit, maliciousness or willfulness, but rather out of a good faith or reasonable belief that it was being handled by those higher in the employer's chain of command than her. Absent any directive or instruction for her to take any further action relative to the J.M. matter, the claimant simply continued to perform her assigned duties for the employer, unaware that she was remiss in any element of those duties.

The Commission can understand the new executive director's profound disappointment that the J.M. matter was not discovered and rectified by her senior or executive management staff earlier, i.e., before a dozen years had elapsed, and a ½ million dollars had been expended in payroll error to J.M. The Commission also has no doubt that the press coverage of these unfortunate circumstances caused the employer, including the executive director and CSB, some embarrassment, including subjecting it to some degree of ridicule.

Nevertheless, even employees who are fired for what the employer considers good cause may be entitled to unemployment compensation. The question is whether a company rule was deliberately violated or whether the employee's acts were of such a nature or so recurrent as to manifest a willful disregard of those interests and duties and obligations he owed his employer. Blake v. Hercules, Inc., 4 Va. App. 270, 356 S.E.2d 453 (1987). The Commission is unable to answer this question in the employer's favor, based upon the evidence in the record for this claimant's particular circumstances. Rather, the only evidence of dishonesty, deceit, fraud or unjust enrichment in the case would appear to be solely attributable to J.M., who apparently received a payroll windfall to which the executive director ultimately discovered in April 2010 that she was not entitled.

Additionally, the claimant has argued that the executive director condoned her actions by waiting approximately 3 months from the point when she had concluded the claimant had failed in some obligation before she made the decision to terminate her from employment. The Commission notes, however, that condonation is a mitigating factor, which only comes into play after the employer has borne the burden of showing misconduct connected with work, either by a violation of a rule or by an act manifesting a willful disregard of the employer's interests, when the burden shifts to the claimant to prove circumstances in mitigation of his or her conduct. VEC v. Gantt, 7 Va. App. 631, 398 S.E.2d 94 (1990). See also, Robinson v. Hurst Harvey Oil, Inc., 12 Va. App. 936, 407 S.E.2d 352 (1991)(evidence was sufficient to support the Commission's finding that the [3-month] delay in dismissing

employee constituted condonation, which mitigated the employee's misconduct [stealing food] and qualified her for unemployment insurance). Since the employer has failed to prove, by a preponderance of the evidence, that the claimant was discharged for misconduct connected with work, as defined by Branch, cited above, the Commission need not delve into the issue of mitigation.

Accordingly, for these reasons, absent proven misconduct, the decision of the Appeals Examiner is hereby reversed. The claimant is qualified for benefits pursuant to Section 60.2-618(2) of the Code. While she was discharged from employment, it was not for circumstances tantamount to "misconduct connected with work."

DECISION

The claimant's request to present additional evidence is denied.

The decision of the Appeals Examiner is hereby reversed.

The claimant is qualified for benefits, effective September 5, 2010, with respect to her separation from the services of the City of Norfolk Community Services Board.

The Deputy is instructed to carefully examine the claimant's eligibility for benefits for any week benefits are claimed and to render whatever appropriate determination is deemed necessary.

Lisa J. Rowley
Special Examiner